Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

———o———

No. 78-1512

———o———

BEVERLY ANN SCHWARTZ, By Her Next Friend, LARRY SCHWARTZ,

Petitioner,

vs.

GORDON GILSTER, Sheriff of Lincoln County, Nebraska,

Respondent.

———o———

APPENDIX

———o———

TERRY KIRK BARBER
1807 First National Bank Building
Lincoln, Nebraska 68508
(402) 474-1791
Attorney for Petitioner
MARCH 26, 1979

GANT PUBLISHING COMPANY, 1610 N Street, Lincoln, Nebraska 68508

IN THE

SUPREME COURT OF THE UNITED STATES

---o---

No. _____

---o---

BEVERLY ANN SCHWARTZ, By Her Next Friend, LARRY SCHWARTZ,

Petitioner,

vs.

GORDON GILSTER, Sheriff of Lincoln County, Nebraska,

Respondent.

---o---

APPENDIX

---o---

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BEVERLY ANN SCHWARTZ, by her next friend, LARRY SCHWARTZ,	)	
Petitioner,	)	MEMORANDUM
vs.	)	
GORDON GILSTER, Lincoln County Sheriff,	)	
Respondent.	)	CV78-L-51

APPEARANCES: For petitioner, Terry K. Barber

For respondent, Milton R. Larson

URBOM, Chief Judge

This habeas corpus action was brought on behalf of the petitioner, Beverly Ann Schwartz, by Larry Schwartz as next friend. A jury found Beverly Ann Schwartz guilty of selling obscene motion pictures, in violation of § 28-926.17, R.R.S. Neb. (Reissue 1975). The petition alleges that the conviction is void because:

1. Individuals between the ages of eighteen and twenty-one and individuals over seventy years of age were excluded from the jury array; and
2. The trial court never properly instructed the jury on the definition of contemporary community standards.

These same issues were raised on appeal from the conviction; thus, state remedies have been exhausted.

I.

JURY SELECTION

Section 25-1601 of the Nebraska Revised Statutes provided at the time of the trial in question:

> "(1) All Citizens of the United States residing in any of the counties of this state and having the qualifications of electors in such counties, who are over the age of twenty-one years and under the age of seventy years and who are intelligent, of fair character, of approved integrity, well informed, able to read, write, and understand the English language, of sound mind and discretion, and free from all disqualifications herein set forth and from all other legal exceptions, are and shall be competent persons to serve on all grand and petit juries in their respective counties. . . ."

The petitioner contends that exclusion of persons be-

tween the ages of eighteen and twenty-one and persons over the age of seventy years resulted in a jury which was not a representative cross-section of the community, thus depriving her of her right to a fair trial guaranteed by the United States Constitution. The Supreme Court of Nebraska rejected this argument, finding that the age groups in question did not comprise an identifiable class and that their exclusion from jury service was not arbitrary. *State v Schwartz*, 199 Neb. 17, 18, 255 N.W. 2d 859 (1977).

The Sixth Amendment's guarantee of jury trials in criminal cases was expressly made applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The United States Supreme Court held in *Taylor v Louisiana*, 419 U. S. 522 (1975), that a state could not systematically exclude an identifiable class—in that case, women—from serving on juries. Such an exclusion would prevent juries from being selected from "representative cross-sections of the community;" such a selection is "an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528.

There can be no doubt that members of the specified age groups are systematically excluded under Nebraska law from serving on petit juries. Unlike the Louisiana law in *Taylor v Louisiana* which allowed a woman to serve on the jury if she filed "a written declaration of her desire to be subject to jury service." *Taylor*, supra, at n. 1, the Nebraska statute provides that the persons in the specified categories are not qualified to serve on juries. The dispositive question in this case is whether the specified group constitutes an identifiable class. The Supreme Court of Nebraska held it did not; I agree.

Cases from the United States Courts of Appeals support this position. In *United States v Olson*, 473 F. 2d 686 (C.A. 8th Cir. 1973), cert. denied, 412 U.S. 905, the Eighth Circuit Court of Appeals was faced with a challenge to a federal statute limiting service on federal juries to those persons over the age of twenty-one. The

court held:

> ". . . [T]he dispositive question is whether persons aged eighteen to twenty compose an 'identifiable group' which cannot be systematically excluded from jury service without rendering juries nonrepresentative of community attitudes. But appellant has 'failed to show that the attitudes of this group [18-20] are inadequately represented by those several years older than they, that is, that eighteen to twenty-year olds are a distinct, cognizable group.' United States v Deardorff, 343 F. Supp. 1033, 1043 (S.D. N.Y. 1971). 'The difference in viewpoint between ages [eighteen to twenty and twenty-one to twenty-five, for example,] . . . would not seem to us of any great significance. . . . We regard it as highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older. . . .' King v United States, 346 F.2d 123, 124 (1st Cir. 1965). Accordingly, we hold that persons aged eighteen to twenty are not an identifiable group the exclusion of which renders a jury list nonrepresentative of the community and violative of the Fifth and Sixth Amendments. . . .
>
> "In closing, we emphasize that we deal here only with two questions: (1) the effect of the Twenty-Sixth Amendment *per se* on statutes erecting the minimum age for jurors; and (2) the constitutionality under the Sixth Amendment, and the Due Process Clause of the Fifth Amendment, of excluding from federal juries persons aged eighteen to twenty."
>
> 473 F.2d at 688-689

See, also, *United States v Geelan*, 509 F. 2d 737 (C.A. 8th Cir. 1974), cert. denied, 421 U.S. 999 (1975).

As in *United States v Olson*, supra, the petitioner has failed to show that the attitudes of these groups are inadequately represented by the age group permitted to serve on juries. The only evidence introduced on the

subject was introduced at the hearing before this court. The petitioner submitted a document which sets out the total population of Lincoln County, Nebraska, in 1970 and the total number of people comprising the nineteen to thirty-four age category and the over-65 age category. Similar figures are supplied from official 1976 estimates. These statistics, which are of only questionable relevance in computing the percentage of the population consumed by the age groups in question in the instant case, are of no relevance in the determination of whether the interests of these groups are adequately represented by qualified jurors. The holding of *United States v Olson* convinces me that in the absence of some showing that the attitudes of eighteen, nineteen and twenty-year-olds are not adequately represented, it is proper to conclude that exclusion of this age group does not infringe upon any constitutional right of the petitioner.

The petitioner seeks to forestall this holding by shifting the focus of attention from the pool of persons available for jury service to the crime involved:

> "We are not concerned with such crimes as murder, robbery or rape which are not matters viewed differently by those of varying age. Rather, we are dealing with pornography, an emotional issue, one causing a broad spectrum of opinion. To foreclose any part of this spectrum, as the trial court felt compelled to do, is to foreclose a fair trial."
>
> Petitioner's Brief, p. 25

I find no authority for that position. The issue as posed in *Taylor v Louisiana*, supra, is whether the jury is selected from a representative cross-section of the community. The petitioner has failed to convince me that the jury in question was selected in an unconstitutional manner.

II.

CONTEMPORARY COMMUNITY STANDARDS

The trial court gave, inter alia, the following instruc-

tion:

> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the contemporary community standard of the intended and probable recipient group is, and in determining the contemporary community standards of said group you may consider the divergent ages, the educated and uneducated, the religious and irreligious men and women, and, of course, the other characteristics which go to make up the 'average person' of the intended and probable recipient group.
>
> "In this connection you may consider the contemporary standards of the community in books, magazines, literature, movies, stage plays, religious, social conduct, and so forth."
>
> Transcript, Supreme Court of Nebraska, p. 96

The petitioner urges that "[t]he court never properly instructed the jury on the definition of contemporary community standards." Petitioner's brief, p. 26. However, she concedes in her brief at p. 28 that "the trial court's direction to the jury was not violative of the Federal Constitution." In *Jenkins v Georgia*, 418 U.S. 153, 157 (1974), the United States Supreme Court held:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* [*v California*, 413 U.S. 15 (1973)] approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller* held that it was constitutionally permissible to permit

> juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographical terms, as was done by California in *Miller*."

The petitioner urged on appeal that the Nebraska Supreme Court adopt a more definite standard as a matter of state law, saying:

> ". . . *Jenkins*, however, does not foreclose this Court from considering the trial court's actions in the context of Nebraska constitutional mandates or other principles of basic fairness."
>
> Appellant's Brief, pp. 28-29

Matters of state law are not cognizable in federal habeas corpus unless those matters also affect some federal rights. The petitioner argues that the Supreme Court of Nebraska's

> ". . . refusal to promulgate a single state standard will prevent a uniform application of state criminal law in derogation of Defendant's Fourteenth Amendment right to equal protection under the law. If each trial court can establish its own definition of community, an act deemed criminal in one community or in one judge's court would not be a crime in another court or at another time. A jury's freedom to choose its own standard will result in a denial of equal protection whenever another jury chooses a more lenient test."
>
> Petitioner's Brief, p. 31

The argument may relate to the state supreme court's failure to promulgate one specific instruction to be given in obscenity cases. Thus, while the Supreme

Court of Nebraska has approved the instruction given in this case, it has not disapproved the giving of an instruction which would establish a community standard based upon a statewide community. If two trial courts in Nebraska apply different tests, a federal constitutional issue might arise. It suffices to note, however, that the petitioner has made no showing that other trial courts in Nebraska have given such differing instructions. I shall not speculate that such is the case.

I conclude that the petition for writ of habeas corpus is without merit.

Dated August 2, 1978.

BY THE COURT

Warren K. Urbom
Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1606

Beverly Ann Schwartz, by her next friend, Larry Schwartz,	*	
Appellant,	*	Appeal from the United States District Court
v.	*	for the District of Nebraska.
Gordon Gilster, Lincoln County Sheriff,	*	
Appellee.	*	

Submitted: December 12, 1978

FILED: December 29, 1978

Before GIBSON, Chief, Judge, and BRIGHT and HENLEY, Circuit Judges.

PER CURIAM.

This is a habeas corpus proceeding filed on behalf of Beverly Ann Schwartz by Larry Schwartz, her husband and next friend, against Gordon Gilster, Sheriff of Lincoln County, Nebraska. The district court (The Honorable Warren K. Urbom, Chief Judge) found the petition to be without merit and dismissed it. Petitioner has appealed.

Petitioner was charged in the District Court of Lincoln County with selling obscene motion picture films in violation of § 28-926.17, R.R.S. Neb. (Reissue 1975).

She pleaded not guilty and was tried before a jury. The jury found her guilty of the three charges brought against her. She was sentenced to pay a fine of $1,000.00 on each charge and to be confined in the county jail for thirty days on each charge; the sentences were made to run concurrently.

Petitioner appealed to the Supreme Court of Nebraska contending that § 25-1601, R.R.S. Neb. (Reissue 1975), which excludes from jury service persons between the ages of 18 and 21 years and persons 70 years of age or older is unconstitutional, and contending further that the trial court erred in instructing the jury with respect to the "community standards" to be employed by the jurors in determining whether the films in question were obscene. The defendant contended that the "community standards" to be employed were those of the State of Nebraska as a whole which would include the large City of Omaha rather than standards that might prevail in Lincoln County.[1]

The Nebraska Supreme Court considered petitioner's contentions in some detail and rejected them. *State of Nebraska v. Schwartz*, 199 Neb. 17, 255 N.W. 2d 859 (1977). Following the affirmance of her conviction, petitioner was confined in the Lincoln County Jail, and her husband immediately filed the instant habeas corpus petition on her behalf. State remedies have been exhausted.

Chief Judge Urbom entertained the writ and ordered petitioner to be released from custody pending disposi-

[1] Lincoln County is a large county in the western part of Nebraska. Omaha is a large city in the eastern part of the State which has a racially mixed population which includes members of the armed forces and government employees. Petitioner evidently took the position that community standards based on the State as a whole and including Omaha would probably be more lenient than those prevailing in Lincoln County standing alone.

tion of the petition and further ordered that the cash bond that she had deposited in the state court be placed in the registry of the federal district court.

On August 3, 1978 the district court filed a full but unpublished memorandum opinion, and denied the petition.

As to the validity of § 25-1601 dealing with eligibility of persons to serve on juries in Nebraska, the district court distinguished the Nebraska statute from the Louisiana statute that was involved in *Taylor v. Louisiana*, 419 U.S. 522 (1975); and the district court held that the exclusion from jury service of persons between 18 and 21 years of age and persons 70 years old or older was not unconstitutional, relying on the holdings of this court in *United States v. Olson*, 473 F.2d 686 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973). *Cf. United States v. Geelan*, 509 F.2d 737 (8th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975).

The district court also concluded that the refusal of the trial court to instruct the jury that in determining the issue of obscenity *vel non* it should apply the standards of a "statewide community" was not error. *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

We agree with the Supreme Court of Nebraska and with the district court that petitioner was properly convicted, and we affirm the conviction principally on the basis of Judge Urbom's opinion and the opinion of the Nebraska Supreme Court.

Affirmed.

A true copy.

Attest:
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(UNPUBLISHED)